No. 83-1911

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IN THE

Supreme Court of the United States

October Term, 1984

CHRISTOPHER L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION and LOWE STOCK CHART SERVICE, INC.,
Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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Preliminary Statement

The Association of American Publishers, Inc. submits this brief, *amicus curiae,* pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of Petitioners Christopher L. Lowe, Lowe Publishing Corporation, Lowe Management Corporation and Lowe Stock Chart Service, Inc. The written consents of the parties to the filing of this brief have been obtained and are being filed with the clerk of this Court.

Interest of the *Amicus*

The Association of American Publishers, Inc. ("AAP"), a not-for-profit trade association organized under the laws of the State of New York, is the major trade association for book publishers in the United States. AAP's more than 300 members include most of the nation's leading commercial book publishers and many smaller and non-profit publishers, including university presses and scholarly associations. Among the myriad publications of AAP's members are many non-fiction works concerned with economic and financial topics, including books devoted to the securities markets and other forms of investment. Set forth in the Appendix hereto is a random sampling of such works from several of AAP's members. Were this Court to accept the sweeping registration and licensing authority over publications here claimed by Respondent Securities and Exchange Commission (the "SEC") and sustained below by the court of appeals, many of these, as well as scores of other similar works, could conceivably be swept within the SEC's regulatory grasp, subjecting their publishers to registration and licensing requirements as a condition of publication.

AAP's members are deeply concerned over the prospect of such potentially far-reaching regulation and for its consequences upon the First Amendment freedoms which they enjoy. Accordingly, the *amicus* urges through this brief that the Investment Advisers Act of 1940—the statutory authority upon which the SEC bases its bold censorial power—be construed so as to deprive the SEC of licensing authority over publications of financial fact and opinion

such as those of Petitioner Lowe. The AAP also respectfully urges that, in reaching this result, the Court reaffirm the constitutional distaste for prior restraints on expression of the type here invoked by the SEC, as well as reject the SEC's effort to expand dramatically the scope of the commercial speech doctrine.

Statement of the Case

A. Background

Petitioner Christopher L. Lowe ("Lowe") is the president of the three corporate entities which join him in this appeal: Lowe Management Corporation, Lowe Publishing Corporation, and Lowe Stock Chart Service, Inc. (herein collectively "Petitioners"). Since 1974, Lowe has periodically published investment newsletters containing information relating to various investment markets. The information so provided consists of factual data pertaining to movements in those markets as well as short- and long-range forecasts. Based upon both general market data and publicly available factual information as to specific publicly-traded securities, the newsletters also contain assessments as to the desirability of investing in any of the markets or securities reported on. The newsletters are distributed by mail to subscribers who pay a fee to receive them.

On May 11, 1981, the SEC revoked the previously granted Investment Adviser registration of Lowe Management Corporation, and barred Lowe from further association with any investment adviser. This SEC action, taken pursuant to sections 203(e) and (f) of the Investment

Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to 80b-21, 80b-3(e), (f) ("Investment Advisers Act"), was based upon Lowe's prior convictions on felony and misdemeanor counts in 1977 and 1978. Though Petitioners had been engaged in the publication of investment newsletters since 1974, neither the prior convictions nor the revocation of registration was based upon any misconduct in connection with those publishing activities. After Lowe Management Corporation's Investment Adviser registration was revoked, Lowe discontinued handling funds and securities on behalf of clients and concentrated solely on publication of the newsletters. Significantly, no claim is made in the instant action that Petitioners have published any false or misleading information in their newsletters or have profited through personal or corporate investments from any advice rendered therein. *SEC* v. *Lowe*, 725 F.2d 892, 895 (2d Cir. 1984).

B. Lower Court Decisions

In June of 1982, the SEC filed a four-count complaint against Petitioners in the United States District Court for the Eastern District of New York. Based upon the fact that Petitioners were not registered under the Investment Advisers Act, the SEC sought, *inter alia*, an order enjoining further publication of their newsletters. The district court, per Chief Judge Weinstein, denied an injunction against Petitioners' publishing activities, holding that the First Amendment did not permit a construction of the Investment Advisers Act which would give the SEC the power to prohibit publication of impersonal investment newsletters. While the district court doubted that the SEC was correct in maintaining that the newsletters in question

constituted commercial speech, it held injunctive relief would in any event be inappropriate as such relief was more extensive than necessary to serve the asserted governmental interest. The district court did, however, issue an injunction prohibiting Petitioners from offering securities information to subscribers by telephone, individual letter or in person. *SEC* v. *Lowe*, 556 F. Supp. 1359 (E.D. N.Y. 1983).

The United States Court of Appeals for the Second Circuit, in a two-to-one ruling, reversed the denial of an injunction against future publication of Petitioners' newsletters. Authorizing the grant of injunctive relief sought by the SEC, Judges Oakes and Van Graafeiland held that whether the case was treated as one involving the permissible regulation of economic activity or as one involving commercial speech, a revocation of registration resulting in a bar to further publication of Petitioners' newsletters did not violate the First Amendment. District Judge Brieant, sitting by designation, dissented on the basis that First Amendment principles required affirmance of the judgment below. *SEC* v. *Lowe*, 725 F.2d 892 (2d Cir. 1984).

Summary of Argument

The injunction authorized by the court of appeals constitutes a classic prior restraint on speech in violation of the First Amendment. The SEC's effort to justify such prior restraint on the grounds that merely commercial speech is at issue is inappropriate in that publications such as those of Petitioners are entitled to the full protections of the First Amendment against suppression absent a showing of imminent harm. Even were the commercial speech

doctrine applicable, the SEC's theory of suppression—that a prior restraint on Petitioners' publishing activities is warranted based on prior, unrelated misconduct—is equally constitutionally impermissible.

Given the potentially untoward application to publishers of financial news and opinion of the SEC's interpretation of the Investment Advisers Act, the Act, to be constitutional, must be sensitively construed to ensure that the threat of similar restraints on other disinterested publishers may be avoided.

ARGUMENT

I. The expression sought to be regulated by the SEC is entitled to full First Amendment protection and should not be relegated to the status of commercial speech.

Central to the disposition of the case below was the determination by the court of appeals majority that Petitioners' publishing activities constitute commercial speech deserving of lesser constitutional protection than other "forms of social, political or religious expression." *SEC* v. *Lowe,* 725 F.2d at 899 (quoting *SEC* v. *Wall Street Transcript Corp.,* 422 F.2d 1371, 1379 (2d Cir.), *cert. denied,* 398 U.S. 958 (1970)). Having so concluded, the appeals court did not confront the SEC's actions as classic prior restraints on expression to be tested under the First Amendment's stringent standards. It instead looked to this Court's commercial speech cases as a basis for justifying the SEC's actions.[1]

1. As we discuss in Point II(B) below, the appeals court erred as well in determining that those precedents, to the extent applicable, permit the injunctive relief afforded the SEC here.

As we discuss below, the majority below was able to categorize Petitioners' publishing activities as commercial speech only through a strained interpretation of this Court's guiding precedents; indeed, an affirmance of that view—relegating "a journal of fact and opinion to paid subscribers," 725 F.2d at 904 (Brieant, J., dissenting), to the category of commercial speech—would have far-reaching and adverse implications for the constitutional status and vitality of countless other publications.

Beginning with *Bigelow* v. *Virginia,* 421 U.S. 809 (1975), this Court has developed a body of law defining the extent of First Amendment protections to be afforded so-called "commercial speech." The cases make clear that commercial speech invariably entails expression which promotes a product or service on behalf of speakers having a direct financial interest in the particular product or service. *See, e.g., Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976) (prohibition on advertising of prescription drug prices violates the First Amendment rights of pharmacists who sell such drugs and consumers who wish to purchase them); *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977) (blanket ban on the advertising by lawyers of the availability and terms of routine legal services violates the First Amendment rights of lawyers); *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York,* 447 U.S. 557 (1980) (total ban on advertisements which promote electric services violates the First Amendment rights of an electric utility); *Bolger* v. *Youngs Drug Products Corp.,* —— U.S. ——, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983) (absolute prohibition on use of the mails for unsolicited advertisements promoting the use of prophy-

lactics violates the First Amendment rights of manufacturer, seller and distributor of contraceptives).

In no instance of which *amicus* is aware has the commercial speech label attached to discussions of lawful products or services on the part of speakers having no pecuniary interest in the subject matter. Were it otherwise, *The New York Times'* restaurant reviews, *Consumer Reports'* product evaluations, and *Esquire's* men's fashion reports, to name just a few, would subject such publications to the more limited protections of the commercial speech doctrine. This Court surely has not intended such a sweeping expansion of the commercial speech doctrine.

If this be the case, then the mere fact "[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is [fully] safeguarded by the First Amendment." *Time, Inc.* v. *Hill,* 385 U.S. 374, 397 (1967) (quoting *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 501-502 (1952)). *Accord Pittsburgh Press Co.* v. *Pittsburgh Commisison on Human Relations,* 413 U.S. 376, 385 (1973); *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 266 (1964); *Smith* v. *California,* 361 U.S. 147, 150 (1959).

The foregoing principles have been plainly disregarded by the SEC and by the court below in their application to Petitioners' publishing activities. It is not contended by the SEC that Lowe has sought to profit from the specific investments or investment strategies discussed in his newsletters; his financial interest lies in the sale of the newsletters themselves. That being the case, it is inappropriate constitutionally to lump together Petitioners' newsletters

with classically commercial advertisements or promotional brochures aimed at promoting sales for the advertiser. Rather, Petitioners deserve to stand on the same constitutional footing as any other publisher who discusses the merits and demerits of products and services—financial and otherwise—as a service to its readers or subscribers.

Apart from the fact that Petitioners have not promoted a commercial transaction to their own benefit, the very content of the publications involved belies any suggestion that they are deserving of anything less than the full protection of the First Amendment. The newsletters' analyses thus go well beyond "buy" and "sell" recommendations with respect to specific securities. They also contain views and opinions on topical issues for investors and potential investors, analyses of current market conditions, and other relevant factual material of interest to subscribers to financial publications. In this regard, the speech here challenged by the SEC is of the same kind as is routinely found in magazines, newspapers and books (*see, e.g.,* the Appendix hereto) devoted to a broad range of financial and investment topics. Such expression is radically different from that presented in the commercial speech cases;[2] it is the essence of news reporting, analysis and opinion, to which the public is entitled to unrestrained access.

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2. In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 761 (1976), in contrast, a factor warranting commercial speech treatment was that the advertiser "does not wish to editorialize on any subject, cultural, philosophical or political. He does not wish to report any newsworthy fact, or to make generalized observations even about commercial matters."

Additional support for the notion that the expression in Lowe's newsletters is not of the kind properly termed commercial speech is

(footnote continued on next page)

Viewed in the context of this Court's prior decisions, the SEC's contention that Lowe's newsletters should be regarded as commercial speech since they offer advice "on the relative merits of various investments and as such merely recommend commercial transactions," *SEC Opposition Brief to Petition for Certiorari ("SEC Opposition Brief")* at 11-12, is clearly incorrect. It is precisely such "advice" and "mere recommendation" which, when provided by a disinterested third party, are sought to be fostered, and are fully protected, by the First Amendment.

II. The injunction prohibiting Petitioners from publishing their newsletters constitutes an impermissible prior restraint on publication.

A. The stringent standards governing issuance of a prior restraint have not been met in this case

This Court has properly admonished that "prior restraints on speech and publication are the most serious

found in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557, 564 n.6 (1980) (citations omitted), where the Court observed:

> Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. . . . In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation'.

Accord Bates v. *State Bar of Arizona,* 433 U.S. 350, 381 (1977). Petitioners' publication of their newsletters can be seen to possess neither feature. Petitioners are not speaking about their own products or services and so cannot be presumed to have intimate knowledge concerning them. Further, the facts and opinions in their newsletters are most certainly not the kind of "hardy breed of expression" resistant to overbroad regulation to which this Court was referring—lest all commentary on financial and other matters with commercial ramifications were to be so classified.

and the least tolerable infringement on First Amendment rights." *Nebraska Press Association* v. *Stuart,* 427 U.S. 539, 559 (1976). This bedrock constitutional principle has resulted in the imposition of an extraordinary burden on those who would seek to impose such a restraint. Indeed, claims that the very security of this nation would be threatened by publication have been rejected as insufficient to warrant a prior restraint, absent compelling evidence: "[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient. . . ." *New York Times Co.* v. *United States,* 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring).

In the face of these demanding constitutional requirements, no showing of any kind was made in the courts below which suggests, let alone establishes, that the continued publication of Petitioners' newsletters would result in anything "kindred to imperiling the safety of a transport already at sea." Indeed, as the SEC has never contended that Petitioners' previously published newsletters contained false and misleading information, it is not surprising that the SEC has nowhere alleged that publication of the newsletters has already caused, or is likely or certain to cause, harm to their subscribers. Instead, the SEC seeks, and the majority below was willing, to suppress Petitioners' newsletters on the basis of prior misconduct *unrelated to Petitioners' publishing activities*—misconduct which, it is claimed, forms a sufficient basis on which to find a potentiality for false and deceptive speech. As

"[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963), *amicus* submits that the SEC's flimsy rationale utterly fails to satisfy its extraordinary burden of proving imminent harm.

There is, moreover, specific precedent which forbids that which the SEC has sought to do here: enjoin future expression on the basis of unprotected past conduct. In *Vance* v. *Universal Amusement Co., Inc.*, 445 U.S. 308 (1980), this Court affirmed a decision holding unconstitutional a statutory scheme regulating nuisances which authorized a prior restraint against a theatre's exhibition of motion pictures not yet finally adjudicated to be obscene, on the basis of a showing that obscene films had been exhibited in the theatre in the past. The facts of *Vance*, involving prior misconduct related to the activity sought to be enjoined, make the instant case, involving prior misconduct unrelated to Lowe's publishing activities, *a fortiori*.

Seeking to avoid application of clearly controlling First Amendment principles, the SEC analogizes the prohibition imposed on Petitioners' publishing activities to the restrictions imposed upon professionals who are barred from practicing in their fields as a result of misconduct. But such effort at analogy fails, since the SEC's action directed against Petitioners' newsletters (as opposed to Lowe's other investment adviser activities) operates as a prior restraint on speech. The sanctions imposed upon Lowe thus go much further than the revocation of a professional license; they not only prevent Lowe from engaging in the professional activities of an investment adviser, but also

completely and effectively prohibit him from espousing his views on financial matters in any publication in which he or his companies have an interest. As was cogently stated by Judge Brieant in dissent:

> The expression of opinion by [Lowe's newsletters] is poles apart from the traditional giving of investment advice; just as remote as a health care publication (*e.g.* "Prevention Magazine") is from the practice of medicine, or a book advising how to avoid probate is remote from the practice of law. The latter require a medical or law degree and a license, while the former are protected First Amendment expression. *See New York County Lawyers Association* v. *Dacey*, 21 N.Y. 2d 694, 287 N.Y.S.2d 422, 234 N.E.2d 459 *rev'g*, 28 A.D.2d 161, 283 N.Y.S.2d 984 (1967).

SEC v. *Lowe*, 725 F.2d at 903.

In the guise of seeking to regulate a profession, the SEC is instead suppressing speech. In reasoning with clear application here, this Court, in its landmark decision in *Near* v. *Minnesota*, 283 U.S. 697, 720 (1931), struck down a similar end-run of the First Amendment: "In attempted justification of the statute, it is said that it deals not with publication *per se* but with the 'business' of publishing defamation. . . . Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint."

Amicus submits that the SEC's bootstrap operation—maintaining that the publishing of newsletters, in and of itself, constitutes the rendering of investment advice, thereby subjecting the publisher to the registration and licensing requirements for investment advisers under the Invest-

ment Advisers Act—is constitutionally inappropriate. The injunction authorized in this case constitutes a classic prior restraint and, as such, should be stricken.

B. Even were Petitioners' expression properly classified as commercial speech, a prior restraint on these facts would not be warranted

While the *amicus* firmly believes that Petitioners' publications are entitled to the full protections of the First Amendment (*see* Point I, *supra*), even if the newsletters are properly viewed as commercial speech and therefore subject to a somewhat more limited form of protection, the complete prohibition on publication authorized by the majority below would still violate Petitioners' First Amendment rights. This conclusion follows most directly from this Court's recognition, in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 566 n.9 (1980), that: "[I]n recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity."

In Central Hudson, the Court set forth a four-part analysis to be used in judging restrictions imposed on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted,

> and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566. In the instant case, it is not disputed that Petitioners' speech concerns lawful activity, and no claim is made that the expression contained in their already published newsletters has been false or misleading.

Rather, the SEC maintains, and the majority below agreed, that Petitioners' publications are "potentially deceptive" because of Lowe's "questionable honesty and integrity." *SEC Opposition Brief* at 12 n.17. It is claimed that since only commercial speech is in issue, Petitioners' publications may be regulated, *i.e.,* permanently banned, based solely on such possibility of future deception. *SEC* v. *Lowe,* 725 F.2d at 901.

The SEC relies on this Court's decision in *Friedman* v. *Rogers,* 440 U.S. 1 (1979), as support for its regulatory rationale. But *Friedman* involved a prohibition on the use of a trade name, a form of expression which, it was emphasized, contains no intrinsic information. 440 U.S. at 12-13. Moreover, this Court made plain in *Friedman* that

> the information associated with a trade name is largely factual, concerning the kind and price of the services offered for sale. Since the [Texas Optometry] Act does not prohibit or limit the type of informational advertising held to be protected in *Virginia Pharmacy* and *Bates,* the factual information associated with trade names may be communicated freely and explicitly to the public. . . . Rather than stifling commercial speech, [the Act] ensures that information regarding optometrical services will be communicated more fully and accurately to consumers than it had been in the past

> when optometrists were allowed to convey the information through unstated and ambiguous associations with a trade name.

Id. at 16. Here, by contrast, the free flow of information is exactly what has been prohibited. As acceptance of the SEC's interpretation of the Investment Advisers Act would completely silence speech rather than provide for a more accurate and complete dialogue, the alleged-potential-for-deception rationale of the SEC simply cannot be said to satisfy the clear requirement of *Central Hudson* that speech be unlawful or misleading before it can be restrained.[3]

As to the asserted governmental interest under the *Central Hudson* test, the SEC indicates the need to "protec[t] investors by regulation of the activities of investment advisory publishers" and "to recognize under federal law the fiduciary relationship that exists between investment advisory publishers and their clients." *SEC Opposition Brief* at 9-10, *citing to SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963). *Capital Gains Research Bureau,* however, provides no authority for the proposition that speech may be regulated in order to protect investors in the absence of a showing that the speech is false and misleading or colored by self-interest.[4]

3. Both the SEC and the majority below rely upon *SEC* v. *Wall Street Transcript Corp.*, 422 F.2d 1371 (2d Cir.), *cert. denied,* 398 U.S. 958 (1970), as authority for the proposition that financial newsletters such as those published by Petitioners are subject to prior restraints due to the limited protection afforded commercial speech. In that action seeking enforcement of a SEC subpoena, however, the issue on appeal was whether the initial determination as to whether a financial newsletter was required to register or instead qualified for the Investment Advisers Act's exemption for "bona fide newspapers" should be made by the SEC or the district court. Significantly, while the court held the initial determination should be made by the SEC and that for such purpose it needed the subpoenaed documents, the ruling neither forced the paper to register nor barred it from publication. Indeed, the court noted that the Investment Advisers Act did not provide authority for a prior restraint, even of commercial speech: "[E]ven if a newspaper is engaging in commercial practices which may be regulated, the Act grants no authority for review or censorship by the Commission of investment advisory material prior to its publication." 422 F.2d at 1380, n.13.

While the *amicus* agrees that the governmental interest in protecting the investing public against fraudulent activities on the part of investment advisers is substantial, it is submitted that this interest is not directly advanced by application of the registration provisions of the Investment Advisers Act to disinterested publishers such as Petitioners who neither act in a fiduciary relationship with their subscribers through, *e.g.*, effectuating purchases and sales of securities on their behalf, nor have been shown to engage in the kinds of practices, such as scalping, which render the advice published deceitful.

Even assuming *arguendo* that suppression of Petitioners' speech is necessary for the effectuation of the stated interest in protecting investors, the injunctive relief authorized below will not accomplish that result. As the majority decision below makes clear, Lowe is not prohibited from making investment recommendations "in someone else's bona fide newspaper as an employee, editor or

4. That case, unlike the present one, involved a publisher who was engaging in the practice of "scalping," *i.e.*, purchasing securities for his own account shortly before recommending the security for long term investment in his publication and then selling the shares at a profit as soon as the market price rose following his recommendation. Holding that such practice constituted the rendering of deceitful advice in the absence of full disclosure as to the investment adviser's self-interest in the effect of his recommendation, this Court still did not enjoin further publication. Rather, it affirmed an order calling for disclosure when such self-interest existed.

writer," 725 F.2d at 902, but only is restrained from making such recommendations in his own publications. By its own terms, therefore, the prior restraint fails another of *Central Hudson*'s tests, for it will not serve to "directly advance" the government's asserted interest in prohibiting potentially deceptive speech. As was stated by Judge Brieant in dissent:

> I fail to see how it can be adjudged that Lowe can exercise his First Amendment protected expressions as to investments, but only so long as he is not himself the owner or proprietor of the publication in which his views appear. Such a distinction must assume that the owner or proprietor of a *bona fide* newspaper will exercise some control over Lowe's writings so as to prevent fraud. There is no assurance that this would be so.

SEC v. *Lowe*, 725 F.2d at 908.

The challenged restraint finally must be overturned because of its failure to meet the last *Central Hudson* test for a permissible restriction on commercial speech: whether the restraint imposed is "more extensive than is necessary" to serve the asserted governmental interest (here, in protecting investors from receiving deceptive investment advice or advice colored by self-interest). In prohibiting speech which has not been shown to be flawed, predicated solely on Lowe's prior misconduct not related to the publishing activities in issue, the injunction here in issue plainly sweeps too broadly to be constitutionally permissible[5]

5. The SEC and the majority below contend that *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978), is dispositive as to the propriety of the prophylactic rule imposed here. *Ohralik*, however,

(footnote continued on next page)

III. The broad potential reach of the SEC's interpretation of the Investment Advisers Act to the activities of publishers must be narrowed in order to preserve First Amendment interests.

A. The SEC's interpretation of the Investment Advisers Act has potentially far-reaching consequences for publishers

Consideration of the proper result in this action should not lose sight of the potential scope of regulation of disinterested publishers under the Investment Advisers Act which the decision below invites. The annexed Appendix contains an illustrative listing of recent books which contain material of a similar overall nature to that found in Petitioners' newsletters. This random sampling of works suggests the potential reach of the SEC's censorship authority under the SEC's, and the court of appeals', interpretation of the Investment Advisers Act. Provided only that a publisher cross the ill-defined line between "bona fide" publications "of general and regular circulation" (an exempt category of publication under the Act) and publications "as to the value of securities or as to the advisability of investing in, purchasing or selling securities" (a description of activities regulated by the Act),

differs from the case at bar in two critical respects. First, it involved an in-person solicitation of clients by an attorney and, second, the attorney was shown to have engaged in the exact kind of misconduct sought to be prevented by the prophylactic rule against in-person solicitation of business. The instant case is more appropriately analogized to *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), which involved published advertisements concerning the availability of routine legal services. Here, as in *Bates* but unlike in *Ohralik*, there is no personal or intimate contact between the speaker and the recipients of the expression and there has been no showing that the speech sought to be prevented by the regulation is misleading or oppressive.

it would be subject to a claim by the SEC that it register and otherwise be subject to the SEC's licensing authority.

It is to be noted in this connection that in 1977, the SEC attempted to clarify the reach of the Investment Advisers Act to publishers by issuing an interpretative release, *Applicability of Investment Advisers Act to Certain Publications,* 17 C.F.R. § 276.563 (1984), 42 Fed. Reg. 2,953 (1977) (Securities and Exchange Commission Release No. IA-563). This Release, however, falls far short of affording adequate protection to the publishers of works whose independent authors write on topics which the SEC subsequently may determine constitute the rendering of investment advice within the definition of the Act. Among other things, the Release states that

> the definition of investment adviser should not be construed to include the author or publisher of any book, pamphlet, or article (1) which does not contain any recommendations, reports, analyses, or other advisory information relating to specific securities or issuers and (2) which is not one of a series of publications by such person or intended to be supplemented or updated, *provided* That the author or publisher has not and does not intend to engage in any other activities which would bring him within the definition of investment adviser.

17 C.F.R. § 276.563, 42 Fed. Reg. 2,953 (footnotes omitted).

It is plain that such guidelines do little to insulate disinterested publishers from potential regulation under the Investment Advisers Act. Indeed, the Release suggests that any publisher who merely publishes a book on the securities market with the expectation that it will subsequently be updated or revised may be subject to the Act's

registration provisions. Likewise, by suggesting the inapplicability of the Investment Advisers Act to publications which do not contain any recommendation, report, analysis, or advisory information relating to a specific security or issuer, the SEC would appear to be implying that any publications which do deal with such subject matters may be required to comply with its pre-publication registration provisions.

The SEC's broad conception of its regulatory reach is further indicated by the Release's note 5, which states that

> there may be publications which do not mention the name of a particular issuer or security, but refer only, for example, to an industry or class. Where the industry or class is very small, or for other reasons the issuer or security referred to is readily identifiable, registration could not be avoided merely because the issuer or security is not specifically mentioned.

The latitude that the SEC has afforded itself to regulate publishers under the Investment Advisers Act is indeed extraordinary. To permit the SEC to brandish such power over publishers would subject the press to precisely the kinds of pre-publication registration schemes specifically condemned throughout the nation's history. *See, e.g., Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976); *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1963); *Near* v. *Minnesota,* 283 U.S. 697 (1931). *See also Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971). Rather than submit to such registration procedures,[6] or take the risk of incorrectly guessing whether a

6. The registration process is in fact burdensome. Pursuant to section 203(c), and SEC Form ADV, a registrant must furnish an elaborate personal history concerning each of its partners, officers,

(footnote continued on next page)

work is in fact covered by the Investment Advisers Act, it is all too likely that many publishers will simply choose not to publish any materials even remotely connected to subjects that the SEC views as falling within its domain. Such a chilling of publication is abhorrent to First Amendment principles. *New York Times Co.* v. *Sullvian,* 376 U.S. 254 (1964); *Smith* v. *California,* 361 U.S. 147 (1959).

The authority the SEC seeks to exercise over disinterested publishers does not, of course, end with this registration power. As previously discussed, what the majority decision below approved is the further power on the part of the SEC permanently and absolutely to prohibit publication of materials viewed as "potentially deceptive," without any required showing as to the false and misleading nature of such publications or the pecuniary interest of their publishers in the investments or investment advice discussed or provided.

Such wide-ranging, unique and unwarranted censorial power over the press should not be left to stand.

B. The SEC's view of its regulatory authority over publishers must be narrowed to avoid conflict with the First Amendment

Amicus submits that the Investment Advisers Act can be construed in a fashion which would permit the SEC to

directors and all other people who perform similar functions. This personal history must include such things as education and business affiliation (for the previous 10 years). Additionally, the registrant must provide the SEC with a description of its business and a balance sheet. Further, the SEC mandates that a publisher comply with additional disclosure requirements concerning its publishing business and how it conducts its research.

regulate where appropriate and in furtherance of the public interest while at the same time deprive it of the authority to impose unnecessary and dangerous registration and licensing requirements on publishers.[7] A narrowing of the broad authority sought and received in this action by the SEC would not in any way be unprecedented. *See, e.g., International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *Daniel,* 439 U.S. 551, 556 n.20 (1979) and the cases cited therein.

The AAP believes that a construction of the Investment Advisers Act sensitive to First Amendment protections is one which would apply its registration and licensing provisions only to publishers whose publishing activities are inextricably intertwined with other investment advisory activities undertaken by them or who are shown to have a potential conflict of interest so that their publications may fairly be viewed as part and parcel of a commercial transaction involving investments in securities.[8] In such cir-

7. *SEC* v. *Suter,* 732 F.2d 1294 (7th Cir. 1984), is cited by the SEC as authority for the proposition that the registration requirements imposed by the Investment Advisers Act and the regulations promulgated thereunder by the SEC are not in conflict with the First Amendment. *SEC Opposition Brief* at 6-7. Although *amicus* submits that the Seventh Circuit incorrectly applied a commercial speech analysis in *Suter,* the holding there would not be dispositive even if the commercial speech doctrine were applicable. The basis for the Seventh Circuit's conclusion that an injunction could issue was the fact that Suter's newsletters had been found to be false and misleading and thus did not qualify for the limited protection afforded commercial speech under *Central Hudson. Suter,* 732 F.2d at 1299.

8. This construction of the Investment Advisers Act could be accomplished in any of several ways. While the SEC has consistently given a cramped interpretation to Section 202(a)(11)(D) of the Investment Advisers Act, which exempts "the publisher of any bona

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cumstances, the speech may fairly be viewed as commercial because it is part and parcel of a commercial transaction involving investments in securities. Where commercial speech is properly found, such a publication might appropriately be subject to some narrow form of regulation by the SEC in order to ensure that the existence of a potential conflict of interest does not result in false or misleading expression.

Where, on the other hand, as in the instant case, the sole activity is the publication of newsletters or other works without any accompanying handling of clients' funds or benefit to be received from investment actions taken by readers or from the specific investment recommendations published, the Investment Advisers Act should not be read to proscribe or otherwise limit such disinterested publishing activity.

Conclusion

The First Amendment should not be construed to allow the SEC to be the gatekeeper of the public's right to receive a wide range of investment information, dependent solely upon the SEC's determination as to the general fitness of the publisher, the value of speech not contended

fide newspaper, news magazine or business or financial publication of general and regular circulation" from the Act's definition of "investment adviser," there is nothing to preclude this Court from construing the publisher exemption more broadly. Alternatively, the definition of "investment adviser" could be read to exclude coverage of impersonally rendered and disinterested advice. Also, Section 202(a)(11)(F) of the Act, which provides for the exemption of "such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulation or order," could be construed to exempt from SEC regulation disinterested publishers of investment newsletters.

to be other than truthful, or the status of works as "bona fide" publications of general and regular circulation.

Amicus respectfully urges that this Court reverse the holding of the majority below classifying Petitioners' newsletters as commercial speech subject to regulation by the SEC. *Amicus* further urges that the injunctive relief authorized below be held to be an unconstitutional prior restraint on speech under the First Amendment regardless of the classification afforded the speech here involved.

Respectfully submitted,

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APPENDIX

Appendix

Books Which Contain Material Of A Similar Overall Nature To That Found In Petitioners' Newsletters

The Aggressive Conservative Investor

Martin Whitman & Martin Shubik
Random House, Inc. 1979

The Complete Book of International Investing:
How to Buy Foreign Securities and
Who's on the International Investment Scene

Rainer Esslen
McGraw-Hill, Inc. 1977

Contrarian Investment Strategy

David Dreman
Random House, Inc. 1980

Dun & Bradstreet's Guide to Your Investments: 1984

C. Colburn Hardy
Harper & Row, Publishers, Inc. 1984

Everybody's Investment Book:
How to Invest Up to $5,000 If You Don't Have It

Dan Malca and Sandy Choren
Bantam Books, Inc. 1984

Financial Tactics and Terms for the
Sophisticated International Investor

Harry David Schultz
Harper & Row, Publishers, Inc. 1974

The Handbook of Financial Futures: A Guide
for Investors and Professional Financial Managers

Nancy H. Rothstein & James M. Little
McGraw-Hill, Inc. 1983

The Handbook of No-Load Funds
Investors, 1983 edition

Sheldon Jacobs
McGraw-Hill, Inc. 1983

How to Buy Money: Investing
Wisely for Maximum Return

Wayne F. Nelson
McGraw-Hill, Inc. 1982

How to Buy Stocks, 7th edition

Louis Engel & Brendan Boyd
Bantam Books, Inc. 1984

How to Cash In on the Coming
Stock Market Boom

Myron Kandel
Bobbs-Merrill Co., Inc. 1982

How to Forecast Interest Rates: A Guide
to Profits for Consumers, Managers & Investors

Martin J. Pring
McGraw-Hill, Inc. 1981

How to Invest your Money and Profit from Inflation

Mort Shulman
Random House, Inc. 1980

The Intelligent Investor: A Book of
Practical Counsel, fourth revised edition

Benjamin Graham
Harper & Row, Publishers, Inc. 1973

Investment Analysis & Management, 2nd edition

Jack C. Francis
McGraw-Hill, Inc. 1976

Investment Strategy

Robert Coates
McGraw-Hill, Inc. 1978

Management of Investments

Jack C. Francis
McGraw-Hill, Inc. 1983

New Contrarian Investment Strategy

David Dreman
Random House, Inc. 1982

Only Investment Guide You'll Ever Need

Andrew Tobias
Bantam Books, Inc. 1983

The Paine-Webber Handbook to Stock and Bond Analysis

Kiril Sokoloff
McGraw-Hill, Inc. 1979

The Phoenix Approach: The Contrarian Investor's Guide to Profiting from Out-of-Favor, Distressed and Bankrupt Companies

William J. Grace, Jr.
Bantam Books, Inc. 1984

The Professional's Investment Guide for Executives and Professionals

Martin Schulman
Acropolis Books, Ltd. 1971

The Questioned Stock Manual: A Guide to Determining the True Worth of Old and Collectible Securities

Albert F. Gargiulo and Rocco Carlucci
McGraw-Hill, Inc. 1979

70% Off! The Investor's Guide to Discount Brokerage

Mark D. Coler, assisted by Ellis M. Ratner
Facts On File, Inc. 1983

Simple Facts About How To Have More Money

Ferd Nauheim
Acropolis Books, Ltd. 1983

Stock Market Strategy

Richard A. Crowell
McGraw-Hill, Inc. 1977

The Stock Options Manual, 2nd edition

Gary L. Gastineau
McGraw-Hill, Inc. 1978

Street-Smart Investing: A Price & Value Approach to Stock Market Profits

George Clairmont and Kiril Sokoloff
Random House, Inc. 1983

Technical Analysis Explained: An Illustrated Guide for the Investor

Martin J. Pring
McGraw-Hill, Inc. 1980

The Thinking Investor's Guide to
the Stock Market, revised edition

Kiril Sokoloff
McGraw-Hill, Inc. 1978

William Donoghue's No-Load Mutual Fund Guide

William Donoghue & Thomas Tilling
Bantam Books, Inc. 1984

Winning the Investment Game:
A Guide for All Seasons

James H. Gibson
McGraw-Hill, Inc. 1984

Winning: The Psychology of Successful Investing

Srully Blotnick
McGraw-Hill, Inc. 1978